Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

BARBARA PROPST and FRANKLIN M. PROPST,

Petitioners,

vs.

DONALD L. BITZER, MORTON W. WEIR, JUDITH S. LIEBMAN, and ROBERT M. BERDAHL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT G. KIRCHNER
Counsel of Record
LERNER & KIRCHNER
Attorneys At Law
201 West Springfield Avenue
Huntington Towers
Suite 608
Post Office Box 1340
Champaign, Illinois 61824-1340
(217) 356-8381

– COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals erred in considering successive applications for Summary Judgment by Defendants Weir, Liebman and Berdahl, when they had elected not to appeal from the District Court's initial denial of Summary Judgment and had been denied leave to appeal by the United States Court of Appeals for the Seventh Circuit.

2. Whether the "reasonable investigation" requirement of *Waters v. Churchill*, 114 S.Ct. 1878, 128 L.Ed 2d 686 (1994) applies to the *Pickering* balancing tests "disruption" element, thereby rendering the judgments below in error.

3. Whether the Courts below erred in denying discovery prior to ruling on a Motion for Summary Judgment on the issue of qualified immunity since the "reasonable investigation" analysis can only be made after discovery is had.

4. Whether the Courts below erred in granting Summary Judgment to Defendants Weir, Liebman and Berdahl on the qualified immunity defense.

5. Whether the Court below erred in granting Defendant Bitzer Summary Judgment despite there being genuine issues of material facts relating to whether the alleged disruption in CERL was sufficient to render Propsts' speech unprotected.

6. Does *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Rankin v. McPherson*, 483 U.S. 378 (1987), require a showing of actual disruption in the work place

QUESTIONS PRESENTED – Continued

as a result of an employee's speech before a State may constitutionally move that employee from his or her position in retaliation for having spoken out on matters of public concern?

7. Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Mitchell v. Forsythe*, 472 U.S. 511 (1985), is a Defendant's subjective belief that an employee's speech has caused disruption in the work place, a proper basis upon which the Court can grant Summary Judgment on the affirmative defense of qualified immunity prior to the Plaintiff being afforded any opportunity for discovery?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, BARBARA PROPST and FRANKLIN M. PROPST, respectfully pray that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit, filed in the above entitled proceedings on November 1, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of the District Court, is reported at 39 F.3d 148 (7th Cir. 1994), and is reprinted in the appendix hereto that APP.1-APP.15. The judgment and orders of the District Court in cause numbers 89-C-3254 (Barbara Propst) and 88-C-3005 (Franklin M. Propst), are unreported decisions reprinted and appendixed hereto at pages APP.16-APP.31.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit was filed November 1, 1994. No Petition for Rehearing was filed. This Court's jurisdiction is premised upon the provisions of 28 U.S.C. Section 1254(1), which provides for review of decisions of the Courts of Appeal by Writ of Certiorari.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 42 U.S.C., Section 1983:

> Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Barbara Propst, was the Assistant Director of CERL for more than three (3) years until the end of November, 1987, when she was removed from that position and transferred to the College of Applied Life Sciences as an Assistant Dean and given no substantive responsibilities. Franklin Propst, held the position of Associate Director of CERL for more than twenty (20) years until November of 1987, when he was removed from his position at CERL and transferred back to the Physic's Department where he was given responsibilities typically given to graduate students despite being a tenured professor. As Associate Director at CERL, Franklin M. Propst was responsible for the overall operation and contractual functions at CERL. Barbara Propst was the business manager.

Donald L. Bitzer was the Director at CERL and as such, had supervisory responsibility vis-a-vis, Franklin and Barbara Propst. The three (3) University administrators named in this action were Chancellor, Morton W. Weir; Vice-Chancellor of Research, Judith S. Liebman; and Vice-Chancellor for Academic Affairs, Robert M. Berdahl. These administrators referred to themselves as the "TROIKA", and together, they had oversight responsibility for all University Departments and Research Units, including the Computer Based Education Research Laboratory (CERL).

During the later part of 1986, and the early part of 1987, the Propsts learned and were made aware that Bitzer had misused and converted property belonging to the University to his private benefit and gain, and the private benefit and gain of a corporation which he had helped form, University Communications, Inc. (UCI). This included the misappropriation of more than $200,000.00 of funds; the use of public funds to raise venture capital for University Communications, Inc.; the fraudulent submission and payment of travel vouchers in violation of State law; the use and shipment of equipment to University Communications, Inc.'s, distributor in Arizona (CompuSat) in violation of University regulations; the use of University personnel and facilities for UCI's benefit; and the negotiation of contracts with the University in which Bitzer purported to represent both UCI and the University at various times.

The concerns raised by the Propsts were initially brought to the attention of Dillon Mapother, an employee in the Vice-Chancellor's Office who had responsibilities as the liaison to CERL for more than ten (10) years. As the Assistant and Associate Directors at CERL, the Propsts were required to safe guard University assets and to insure compliance at CERL with applicable State Law and University policies, procedures and regulations.

When the concerns raised by the Propsts were brought to the attention of Judith Liebman, she responded by asking Bitzer to explain the extensive shipment of equipment and computer time, and why services had been provided from CERL to CompuSat without there being any contractual arrangement between the University and CompuSat for such equipment, time and

services. Bitzer learned that the Propsts were the source of the information which had been conveyed to the Vice-Chancellor's Office, and immediately launched a campaign to isolate, undermine, and discredit the Propsts. His campaign included threats to resign; false claims of insubordination against the Propsts; claims that the Propsts were not performing their work assignments; isolating the Propsts by withholding information required by them to perform their jobs; cajoling, intimidating and pandering CERL staff in an effort to get them to turn against the Propsts; and making false claims of impropriety against them.

When Bitzer threatened to resign on January 28, 1987, Judith Liebman immediately arranged a meeting with Bitzer. During that meeting, Bitzer told Liebman that he and Frank Propst had been unable to work together for at least the last six (6) to eight (8) months, and complained similarly of Barbara Propst. Immediately thereafter, Bitzer advised the Plaintiffs that he had been ordered to remove them from their positions by University Administrators and that he had not been given a reason for that action. When Defendant Liebman learned of this misrepresentation, she demanded that Bitzer correct it.

On January 30, 1995, Liebman instructed Bitzer to retract the termination after having been advised by Jane Loeb and Bitzer that firing the Plaintiffs at this time could be interpreted as firing the whistle blowers and after having been advised by the University Legal Counsel's Office that this action could be "worth a million dollars to the Propsts".

On February 2, 1987, the TROIKA appointed Jane Loeb to conduct an investigation, the purpose of which Dillon Mapother believed to be the gathering of evidence to permit the firing of the Propsts in an effort to appease Bitzer. By February 20, 1987, however, the University of Illinois Legal Counsel's Office had requested an internal audit of CERL independent of the TROIKA investigation, and the TROIKA investigation had to be aborted.

The audit which was conducted between March and September of 1987, showed that all of the allegations made by the Propsts were accurate. As a result of this, the auditors were severally criticized and accused of bias, sloppy work, incompetence, and being ignorant of the manner in which University research was conducted.

The removal which had been stayed since January, was finally implemented in November of 1987. Between January and November of 1987, there were no complaints about the Propsts' job performance. Despite this, Franklin Propst was transferred to a storage room and given a work assignment typically given to a first year graduate student. Barbara Propst was transferred to an office in the top corner of Huff gymnasium, isolated from the activities and operations of her assigned work area, and given a position which required no substantive work.

Prior to the actual removal of the Plaintiffs from their positions in November of 1987, Liebman never met with anyone at CERL to discuss any real or perceived problems other than with Bitzer. In deposition testimony, she testified the decision to fire the Propsts was made by January 28, 1987. Liebman told Bitzer to wait until the audit was over and then the Propsts would be removed.

She admitted in her deposition testimony that removing them before the audit was completed would be viewed as firing the "whistle blowers". When the audit findings supported the Propsts' allegations, Liebman criticized the auditors and their findings. Defendant Berdahl testified that he had had visits from CERL employees on two (2) occasions between January and November of 1987, and that on those occasions there were no specific references to the Propsts or any complaints about them or their job performance. In fact, Berdahl testified that he did not attribute *any* of the problems in the laboratory to Franklin Propst. In his mind, the problems at the laboratory were as a result of the audit and were not problems which were uncorrectable. Berdahl met with Franklin Propst in April of 1987, and at that time advised Dr. Propst that he would be removed from CERL. This was *before* Berdahl had met with *any* employees. At no time thereafter did Berdahl meet with either of the Propsts.

Shortly before their removal in November of 1987, Bitzer complained once again to Defendant Weir that the Propsts were "still around". In that letter, Bitzer reminded Weir, Liebman and Berdahl, that in March of 1987, he had requested, and they had promised, to resolve the CERL business office problems (Frank and Barb Propst) quickly if he agreed to remain as Director. Liebman testified that the only question as of September 8, 1987, was whether Bitzer had decided to fire both Franklin and Barbara Propst.

Defendant Berdahl testified that the internal auditor, Mr. Moran, told University administrators that the transfer of University property to Mr. Bitzer's private corporation without knowledge or compensation to the

University, was quite possibly "a violation of the law, or certainly, of University regulations". This audit resulted in monies having to be repaid by Defendant Bitzer personally or on behalf of his corporation, UCI.

Defendant Weir testified that in every instance, the concerns which had been raised by the Propsts turned out to be real problems but that as a result of the Propsts having raised the concerns which they raised, the wells had been poisoned with Bitzer and that it was not possible for the Propsts to continue working there. Weir testified that since Bitzer was unwilling to continue working with the Propsts, they would have to be removed. When Dillon Mapother attempted to meet with Weir to discuss the situation at CERL, Weir refused.

The deposition testimony of numerous employees, including Jack Stifle, Robert John Barry, Gary Rypski, Dave Meller, Martin Segal, Nicole Chorak, Christine Poling, Connie Kyse, Bill Strutz, Janice Cormabner, Jim Knoke, and Jim Pence, was presented below in opposition to Defendants Weir, Liebman and Berdahl's Motion for Summary Judgment on the issue of qualified immunity. Each of these employees testified to their positions at CERL and that there had been no disruption in the business functions of CERL, nor in the day to day responsibilities of the Propsts, nor in their own abilities to perform their work requirements at any time prior to the Propsts being removed from their positions at CERL.

Dewey Zufeldt, the President of CompuSat of Arizona and the Vice-President, Secretary and Treasurer of CompuSat International, testified that he had been told by Bitzer to lie to the internal auditors for the University

of Illinois about the monies which were being received from the Pinal County School District. This was necessary in order to insure that the University did not learn that the services being provided by the University were being provided without cost, and were then being sold by CompuSat to the Pinal County School District. This was essential to Bitzer's continuing misrepresentation of the nature of the CompuSat project. He had convinced University administrators that it was a research project and as such the shipment of equipment, and the provision of time and services in supporting CompuSat, was consistent with University regulations. When the University auditors continued pressing Pinal County, Defendant Bitzer advised that a letter should be sent to the University threatening to sue them and Dewey Zufeldt carried out that suggestion. Throughout this time, Bitzer told Zufeldt that he was working to get rid of the Propsts, and that he was going to get them reassigned. After they had been removed, he told Zufeldt that he had "finally got them out". He proudly announced to Zufeldt that Franklin Propst had been "relegated to a cubby hole where he can't do any harm".

Contrary to the representations of the Defendants, James Moran, the Assistant Director of Investigations in the Auditing Department, testified that even as of June of 1987, he still had not resolved the question of whether there was criminal wrong doing by Donald Bitzer. He was certain, however, that there was a conflict of interest. The Director of Audits, Dick Traver, expressed concern to the University Administrators that the Propsts were being criticized for questioning "expenditures that needed to be

questioned", and that the Administrators were reacting by "shooting the messenger".

Until shortly before their removal in November of 1987, the Propsts continued to perform their responsibilities at CERL. Their removal in November followed another demand and threat by Bitzer. The pretextual reason offered by the Administrators for their removal is belied by the undisputed facts.

Barbara Propst's case was originally filed in the Circuit Court of Champaign County, Illinois. Defendants removed the State Court action to the District Court for the Central District of Illinois under Title 28, U.S.C., Section 1331. Franklin Propst's cause of action was originally filed in the District Court and jurisdiction over that cause of action was proper under Title 28, Sections 1331 and 1343(a)(3).

The Court of Appeals for the Seventh Circuit reversed the District Court's denial of Summary Judgment on the issue of qualified immunity as to Weir, Liebman and Berdahl – first as to Barbara Propst (*Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991)), and then after having denied Weir, Liebman and Berdahl's request for leave to file an interlocutory appeal (*Weir v. Propst*, 915 F.2d 283 (7th Cir. 1990)), as to Franklin Propst.

REASONS RELIED UPON AND ARGUMENT IN SUPPORT OF THE PETITIONER'S REQUEST FOR THE ISSUANCE OF A WRIT OF CERTIORARI

The Court of Appeals affirmed the District Court's granting of summary judgment on the issue of qualified immunity as to Weir, Liebman, and Berdahl, and supported this judgment by relying solely upon the Defendants' self-serving testimony that they had met with other CERL employees, and the auditors, prior to removing the Propsts from their positions at CERL, and that they were convinced, as a result of those meetings, that the effective operation of CERL required the Propsts removal.

In *Waters v. Churchill*, 114 S.Ct. 1878, 128 L.Ed. 2d 686 (1994), this Court recognized the importance of permitting Government employees to speak out on matters of public concern and balanced that need against the Government's need for efficiency in achieving its goals. The Court rejected the application of the *Connick* (*Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed. 2d 708 (1983)), test as requiring only that the employer testify in a self-serving manner to its perception of the need to take action against those who have spoken out. The Court held that the inquiry must be whether the employer made a reasonable investigation. Justice Souter, in a concurring opinion, emphasized that in order to avoid liability the public employer must not only reasonably investigate the third party reports, but must actually believe them. Thus, the public employer must demonstrate not only that it undertook an objectively reasonable investigation, but

that the decision makers actually believed the information which had been received.

In this case, there was no evidence that the administrators had made any effort at all to discern whether there was actual disruption in the working environment at CERL, and in fact, had they undertaken such an investigation, they would have learned from those employees named herein and others, that in fact the business office, and CERL generally, were functioning well, and that the only problem which existed was as a result of the Director having been offended by having been called to question and audited regarding his use of University equipment, assets, and personnel.

The Court of Appeals believed that qualified immunity is properly granted if the decision makers simply testify that they relied upon employees who complained about the audit (and yet even those employees never complained about the Propsts) and if as a result thereof they had formed the belief that either the Propsts or Bitzer would have to be removed. This analysis is contrary to the test set forth in *Waters*.

Contrary to the Appellate decision, there were genuine issues of facts relating to the disruption issue. In fact, in denying the *Motion for Summary Judgment* on the issue of Qualified Immunity initially, the District Court held that there were genuine issues of material fact relating to the *actual* effect of the Propsts' speech on office discipline and harmony. In *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991) (referred to in the Court of Appeals opinion below as Propst 1), the Court of Appeals rejected the objective inquiry required under *Pickering v. Board of Education*, 391

U.S. 563 (1968), and held that the issue is not what the conditions in the laboratory were, but instead what the Administrators reasonably believed them to have been. As indicated in *Pickering*, the competing interests in this analysis involve the employee's interest in addressing matters of public concern and the employer's interest in providing efficient public services through its employees. A third interest, not often mentioned is the government's need to have corruption exposed.[1] This same balancing of interests was discussed most recently in this Court's opinion in *Waters v. Churchill*, 114 S.Ct. 1878, 128 L.Ed. 2d 686 (1994), in which this Court held that the decision makers must make a reasonable investigation. This requirement was ignored by the Courts below. In *Rankin v. McPherson*, 483 U.S. 378 (1987), this Court relied upon the fact that there had been no evidence that the statements complained of had interfered with the efficient functioning of the office, and noted that where an employee serves no confidential policy making or public contact role, the danger to the agency's successful functioning from an employees private speech is minimal. (*Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891 at 2900 (1987).)

The necessity of discerning whether disruption resulted from the complained of speech has consistently been an object of inquiry in the Seventh Circuit prior to this case. (See e.g. *Conner v. Reinhard*, 847 F.2d 384 (7th

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[1] See however *Feldman v. The Philadelphia Housing Authority*, ___ F.3d ___, 1994 WL 712873 (3rd Cir. 1994) where the Court characterized speech involving government impropriety as occupying the highest rung of first amendment protection.

Cir. 1988)); *Greenburg v. Kmetko*, 922 F.2d 382, at 384 (7th Cir. 1991); *Hostrop v. Board of Junior College District #515*, 471 F.2d 488, 492 (7th Cir. 1972); *Ohse v. Hughes*, 816 F.2d 1144 (7th Cir. 1987); *Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1972); (see also *Zamboni v. Stamler*, 847 F.2d 73 (3rd Cir. 1988)).

By focusing on a Defendant's subjective belief as the Court does herein, and without any inquiry into the objective reasonableness of that belief, the Court's decision squarely conflicts with the reasonable inquiry analysis of *Waters v. Churchill*, 114 S.Ct. 1878, 128 L.Ed. 2d 686 (1994). Furthermore, such an analysis was rejected by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Mitchell v. Forsythe*, 472 U.S. 511 (1985), and *Siegert v. Gilley*, 111 S.Ct. 1789 (1991).

> We have on several occasions, addressed the proper analytical frame work for determining whether a Plaintiff's allegations are sufficient to overcome a Defendant's defensive qualified immunity asserted in a Motion for Summary Judgment. Qualified immunity is a defense that must be pleaded by a Defendant official, *Gomez v. Toledo*, 446 U.S. 635, 100 Sup.Ct. 1920, 64 Ill.Ed 2d 572 (1980); *Harlow*, 457 U.S. at 815, 102 S.Ct., at 2736-2737. Once a Defendant pleads a defense of qualified immunity, "[O]n summary judgment, the Judge may appropriately determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. . . . until this threshold immunity question is resolved, discovery should not be allowed "id., at 818, 102 S.Ct. at 2738 (*Siegert v. Gilley*, 111 S.Ct. 1789 (1991)).

The Court also interjects into the qualified immunity analysis, an inquiry – that is, whether a reasonable investigation was conducted – which can only be resolved after discovery has been permitted. Yet, by allowing discovery on this issue, the trial courts would go beyond the dictates of this Court's opinion in *Siegert v. Gilley*, 111 S.Ct. 1789, 114 L.Ed. 2d 277 (1991) which clearly held that discovery was not permissible in determining whether qualified immunity should be granted since the only issue in the qualified immunity analysis is whether the law was clearly established at the time an action occurred. In affirming the judgment below on the basis of "qualified immunity" for Weir, Liebman, and Berdahl, the Court of Appeals' decision assumes that which the District Court rejected. That is, the Court of Appeals decision seems to turn on a *Pickering* balancing test rather than the state of the law at the time of the conduct complained of.

The Court of Appeals further erred in reaching the qualified immunity issue with respect to Weir, Leibman, and Berdahl, in that these Defendant's had previously elected not to appeal the District Court's decision denying their *Motion for Summary Judgment*. Given that election, they were foreclosed from filing successive appeals on that issue, or successive Motions for Summary Judgment. On January 31, 1990, the District Court denied Weir, Leibman, and Berdahl's *Motion for Summary Judgment* on the issue of qualified immunity. No appeal was taken from that Judgment. On April 2, 1990, a *Joint Motion to Reconsider the Denial of Summary Judgment or in the Alternative, for a Finding under 28 U.S.C. Sec. 1292 (b)* was made by these Defendants. The District Court reaffirmed it's decision denying summary judgment to these

Defendants. They then sought, as a result of the District Court's certification, Leave to Appeal to the Seventh Circuit. That request was denied. (*Weir v. Propst*, 915 F.2d 283 (7th Cir. 1990).) Thereafter, on September 30, 1991, Defendants Weir, Leibman, and Berdahl again renewed their *Motion for Summary Judgment* for the third time. On this occasion, the District Court allowed the Defendants to renew their *Motion for Summary Judgment* and by Order filed November 10, 1992, granted Summary Judgment to them.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court addressed the question of when an interlocutory order denying summary judgment on the issue of qualified immunity was appealable.

Before reaching its decision in *Mitchell*, the Supreme Court examined its decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which the Court found that the Doctrine of Qualified Immunity was not simply a defense to liability, but was also an immunity from suit itself, and that in the event the case is allowed to go to trial, the underlying purpose behind the Qualified Immunity Doctrine is lost (at 425). Consequently, a trial court's denial of summary judgment on the issue of qualified immunity "finally and conclusively determines the Defendants' claim of right not to stand trial on the Plaintiffs' allegations" (at 426). "Qualified immunity is, in part, an entitlement not to be forced to litigation the consequences of official conduct" . . . and, therefore, "a claim of immunity is conceptually distinct from the merits of the Plaintiff's claim that his rights have been violated (at 426).

The United States Supreme Court in *Mitchell*, therefore, held that a District Court's denial of a claim of Qualified Immunity is an appealable "final decision" within the meaning of 28 U.S.C., Sec. 1291 (at 427).

In *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), the Sixth Circuit Court of Appeals held that the failure to file a timely appeal from a District Court's denial of summary judgment on the issue of qualified immunity effectuates a waiver of the Defendants' right to have the issue of qualified immunity determined *prior to trial*.

Citing Federal Rule of Appellate Procedure 4(a) (Fed.R.App. 4(a)), the Sixth Circuit held that unless the Defendant files a notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a) within 30 days of the denial of the entry of the order denying its motion for summary judgment on the issue of qualified immunity, the Defendants' right to have that issue determined *prior to trial* is to be considered waived (at 301). Furthermore, the Sixth Circuit held that any motions for reconsideration must also be timely filed in order to interrupt the passage of the 30-day time period for the filing of an appeal, and that the untimely filing of such a motion will not toll the time for the filing of a notice of appeal.

Similarly, the Seventh Circuit has recognized that an order entered by a court denying summary judgment on the issue of qualified immunity is immediately appealable pursuant to the provisions of 28 U.S.C., Sec. 1291, and this Court's decision in *Mitchell v. Forsyth*. (See *Jackson v. Elrod*, 881 F.2d 441, at 443 (7th Cir. 1989); *Apostol v.*

Gallion, 870 F.2d 1335 (7th Cir. 1989); *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988).)

In *Apostol*, the Seventh Circuit cited, with approval, the Sixth Circuit's decision in *Kennedy*, and then noted that the application of the *Kennedy* rule, which precludes an appeal prior to trial on the issue of qualified immunity once that right has been waived by the untimely filing of a notice of appeal, or the untimely filing of a motion for reconsideration, does not result in the Defendants losing their right to contend on an appeal from the final judgment, that they enjoy immunity from any damage claims, it only results in a waiver of their right to be free from the case proceeding to trial (at 1339). (See also *Kurowski*, where the Court held that a public official may raise questions of immunity on appeal from a final judgment, even though he bypassed the opportunity to take an interlocutory appeal (at 773).

When the Defendants failed to appeal, in a timely manner, from the denial of qualified immunity, and when they were further unsuccessful in convincing the Seventh Circuit to grant leave to appeal, the Plaintiffs had a right to proceed to trial, and the Defendants did not have a right to ask the Court to reconsider for a third time the qualified immunity issue prior to trial.

The Court of Appeals also affirmed the District Court's grant of Summary Judgment to Bitzer. The Court acknowledged, in it's opinion, that even Defendant Bitzer had conceded that the Propsts' speech involved a matter of public concern. In affirming the District Court's grant of Summary Judgment, the Court of Appeals asserted that the speech was highly disruptive to close working

relationships in the work place that required loyalty and confidence and that this evidence of disruption was not undermined by any evidence proffered on behalf of the Propsts. The Opinion relies upon two meetings with employees from CERL with Defendant Berdahl who complained about the audit, not the Propsts, and "several employees" who, according to the Court's decision, Berdahl claims told him that the Propsts were intentionally impeding the work of the laboratory. The Court holds that the testimony of all of the other employees at the CERL lab who testified that there was *not* disruption in the laboratory, was insufficient to raise a question of material fact.

> The fact that some CERL employees did not feel affected does not negate the fact that others did. (Opinion at page 9)

The Court of Appeals' position seems to be that if there are employees who complain of disruption in the working environment, a Plaintiff is not entitled to proceed to trial by proffering evidence from other employees that such disruption did not exist. Contrary to the Court of Appeals' opinion, the beliefs, opinions, and attitudes of named, and deposed employees should be given as much, or more weight, than those unnamed employees relied upon by the Defendants and as such the Court of Appeals should have held that there was a genuine issue of material fact which precluded the granting of Summary Judgment in this case.

Furthermore, if the inquiry under the *Pickering* Balancing test now revolves around the credibility of the persons reporting the alleged disruption, discovery should be permitted to enable a Plaintiff to address those issues. Franklin

Propst sought leave from the District Court to conduct discovery on March 13, 1991, April 8, 1991, and February 1, 1992, and on each occasion the District Court refused to allow discovery to proceed, thus sustaining Defendants' objections to discovery proceeding while Barbara Propst's case was pending before the Court of Appeals for the Seventh Circuit.

CONCLUSION

The Court of Appeals holds that Propsts' speech was unprotected and that the Administrators were entitled to qualified immunity. It reaches this decision by pointing to the "disruption" which the Defendants claimed they learned of through employees at CERL, and Bitzer. The Court supports this decision by relying on the Administrator's decision to launch the Loeb investigation, and to await the outcome of the internal audit.

As evidenced by the record below, the Loeb investigation was an effort to justify the removal of the Plaintiffs from their positions at CERL. It was aborted when the University legal Counsel insisted on a formal audit. Bitzer's complaints about the Propsts were persistent and his demands that they be removed were increasingly tied to his threat to resign his position as Director. Nothing less than this retaliation should be expected from the object of their investigation. Reliance on Bitzer is not objectively reasonable. Furthermore, it should be noted that it was their duty to report these improprieties, and thus any disruption, as a result thereof, should not be the basis for their removal.

> Exposing waste, fraud, and corruption within an agency will likely cause disruption, particularly when done by a person whose responsibility it is to unveil such conduct. This type of disruption, however, cannot justify a retaliatory discharge. (*Feldman*, at 6)

The audit confirmed "in every instance", the concerns raised by the Propsts. Thus, the audit does not support the decision to remove the Propsts from their positions. By doing so within days of Bitzer's final demand for their removal, the pretextual justification proffered by Weir, Liebman and Berdahl, (and relied upon by the Court of Appeals in affirming the judgment in favor of all Defendants) should have been rejected by the Courts below. Even the meetings with some of the employees at CERL with Berdahl cannot support this decision. Those meetings occurred *after* Berdahl told Propst that he was going to be removed and *after* the date on which Liebman testified the decision to remove them had been made. Moreover, these employees never complained of the Propsts. It was the audit that drew their concern.

The Court of Appeals' decision hinges on the propriety of allowing the wrongdoer (Bitzer) to generate disruption and dishonesty; to demand the whistle blowers' (Propsts) removal, under threats of resignation; and the University which ordered the audit to use the effects of their own conduct to silence and punish the Propsts for having spoken out. Clearly, this places the Court of Appeals squarely in conflict with this Court's decision.

Finally, the deposition testimony of other employees at CERL who testified to the lack of disruption, and the efficient functioning of the lab, should have foreclosed

Summary Judgment. The Court of Appeals rejects their testimony by stating that their testimony does not prove that there was not disruption. Whether it does or does not should be for the trier of fact. At the very least, there was a question of fact and Summary Judgment should have been foreclosed. The evidence adduced certainly calls into question the reasons for the removal of the Propsts from their positions at CERL. This evidence is specific and nonconclusory. As in *Waters*, this should have been sufficient to allow the Petitioners to proceed to trial.

The Court of Appeals erred in permitting successive applications for Summary Judgment on the issue of qualified immunity after Weir, Liebman and Berdahl had waived their rights to appeal. In doing so, the Seventh Circuit is in conflict with the Sixth Circuit and this Court's intervention is necessary to resolve this conflict.

The Court also erred in affirming the District Court's grant of Summary Judgment for each Defendant. While, this Court's opinion in *Waters* is a plurality opinion, the guidance it provides is that the Administrators were not entitled to qualified immunity simply because they say that they believed the efficiency of the CERL operation compelled the removal of the whistle blowers. The objectively reasonable investigation, commanded by *Waters*, is lacking in this instance.

For these reasons, the Petitioners pray that their Petition be granted, and that thereafter the Judgments of the Court of Appeals and the District Court, be reversed and this cause be remanded for further proceedings.

Respectfully submitted,

Franklin M. Propst and
Barbara Propst, Petitioners,

ROBERT G. KIRCHNER
Counsel of Record
LERNER & KIRCHNER
Attorneys At Law
201 West Springfield Avenue
Huntington Towers
Suite 608
Post Office Box 1340
Champaign, Illinois 61824-1340
(217) 356-8381

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 93-3825 & 93-3826

BARBARA PROPST and
FRANKLIN M. PROPST,

Plaintiffs-Appellants,

v.

DONALD L. BITZER, MORTON W. WEIR,
JUDITH S. LIEBMAN, and
ROBERT M. BERDAHL,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield
Division, Nos. 89 C 3254 & 88 C 3005 –
Richard Mills, *Judge.*

ARGUED MAY 13, 1994 – DECIDED NOVEMBER 1, 1994

Before CUDAHY, KANNE, and ROVNER, *Circuit Judges.*

ROVNER, Circuit Judge. Barbara Propst, former Assistant Director of the Computer-based Education and Research Laboratory ("CERL") at the University of Illinois at Urbana-Champaign,[1] and her husband Franklin M. Propst, former Associate Director of CERL, sued the

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[1] Although commonly referred to as "Champaign-Urbana," the campus' official title locates it at "Urbana-Champaign."

Laboratory's Director, Donald L. Bitzer, and three university administrators. The Proposts contended that they had been transferred from their positions at CERL in retaliation for exposing Bitzer's misappropriation of university funds, in violation of the First Amendment and state law. The Propsts now appeal several of the District Court's rulings that together resulted in the dismissal of all of their claims, and we affirm.

1.

As Associate Director of CERL, Franklin's responsibilities had been primarily administrative, such as overseeing the Laboratory's finances and negotiating personnel contracts. A physicist by training, Franklin also worked closely with Director Bitzer in setting the Laboratory's research goals. As Assistant Director, Barbara Propst managed the Laboratory's business office. Franklin was Barbara's immediate supervisor, and both Propsts reported to Bitzer. The three university administrators named in the Propsts' suit included Morton W. Weir, who became Chancellor of the University on August 21, 1987 and was the chief administrative officer of the Urbana campus at the time of the Propsts' transfer. Weir coordinated the work of four Vice-Chancellors, including Vice-Chancellor of Research Judith S. Liebman and Vice-Chancellor for Academic Affairs Robert M. Berdahl, who were also named as defendants. Weir, Liebman and Berdahl together comprised a committee that oversaw all university departments and research units and was authorized to make personnel changes in order to ensure effective functioning.

In late 1986 or early 1987, the Propsts began questioning several aspects of CERL's business operations. The Propsts alleged to university officials that Bitzer had diverted university resources to benefit himself and private companies that he controlled, and that he had failed to document various expenditures as required under university regulations. During the same period, Bitzer complained to Liebman about difficulties he was experiencing in working with the Propsts. Bitzer told Liebman that the mistrust between himself and Franklin seemed unremediable, and that he doubted the three could continue working together effectively. In response, Liebman suggested that Bitzer consider removing the Propsts from their positions. In late January or early February 1987, however, Liebman, Berdahl and then-Chancellor Thomas Everhart decided that it would be inadvisable to transfer the Propsts without first investigating their allegations. An informal investigation by Associate Vice-Chancellor Jane Loeb was initiated but then discontinued in favor of a formal audit by the Office of University Audits.

The audit, which relied on interviews of CERL employees and other data from the Laboratory, began in March 1987 and lasted for six months. In an October 27, 1987 letter to Weir, Bitzer complained that the auditors' inquiry into his business practices was highly intrusive and that the auditors were treating him with impertinence. He contended that the investigation was wholly unwarranted and threatened to resign if the disruption caused by the Propsts' allegations was not brought to a rapid conclusion. (Plaintiffs' Ex. 7B.) The auditing department's Assistant Director of Investigations, James E. Moran, also

testified that Bitzer had threatened to resign three times during the course of the audit. (Moran Dep. at 159, 190).

After causing considerable disruption at CERL (Discussed in detail below), the audit ultimately absolved Bitzer of any wrongdoing. Believing that the Laboratory could not continue to function with the disharmony that had been produced, the administrators removed the Propsts from their posts at CERL in late November 1987. Barbara Propst was assigned to the position of Assistant Dean in the College of Applied Life Sciences, and Franklin Propst was returned to his previous position as a tenured professor of physics. Neither transfer resulted in any loss of compensation or rank, and both Barbara and Franklin received their scheduled salary increases for the 1987-88 academic year.

On November 25, 1987, Franklin sued in federal court under 42 U.S.C. § 1983, alleging that he had been transferred in retaliation for his accusations regarding Bitzer, in violation of the First Amendment. Franklin also alleged that the transfer violated a state law prohibition against retaliatory discharge for exposing misuse of public funds. The district court dismissed his state law claim, and Franklin subsequently filed an amended complaint. The district court denied the defendants' motion for summary judgment based on qualified immunity, and a panel of this court rejected their belated request for leave to file an interlocutory appeal of that decision. *Weir v. Propst*, 915 F.2d 283 (7th Cir. 1990).

On October 27, 1989, Barbara sued in state court, alleging that her removal from CERL violated both the First Amendment and state law. After Barbara's suit was

removed to federal court, the defendants moved for dismissal of her state law claim and for summary judgment with respect to her First Amendment claim, again asserting the defense of qualified immunity and relying on the evidence previously developed in Franklin's case. The district court dismissed the state law claims but denied the motion for summary judgment for the same reasons it had articulated in Franklin's case. Upon the timely appeal of that decision this court reversed, finding that Weir, Liebman and Berdahl were entitled to qualified immunity. *Elliott v. Thomas*, 937 F.2d 338, 346 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 973, 1242 (1992) ("*Propst I*").[2]

The administrators then renewed their motion for summary judgment on the basis of qualified immunity against Franklin, and the district court granted it in light of our decision in *Propst I*. The Propsts' First Amendment claims against Bitzer were subsequently consolidated, and Bitzer's renewed motion for summary judgment against both Propsts was granted. Franklin now appeals the district court's grant of summary judgment to Weir, Liebman and Berdahl, and both Propsts challenge the court's grant of summary judgment to Bitzer as well as its dismissal of their state law claims.

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[2] The appeal was consolidated with that of William Thomas in *Elliott v. Thomas*. Although the case bears that name, we will refer to it as "*Propst I*." The *Propst I* panel also dismissed for want of jurisdiction Bitzer's interlocutory appeal, which raised defenses unrelated to the qualified immunity issue. 937 F.2d at 342.

II.

A. *Wier, Liebman and Berdahl*

There is very little question that the district court was correct to reverse itself on the administrators' entitlement to qualified immunity in Franklin's case following our decision in *Propst I*, which addressed precisely the same issue in Barbara's case. The two cases were based on the same record, and depositions taken for Franklin's case had been available in Barbara's case. *See* 937 F.2d at 346. Indeed, the *Propst I* court all but formally reviewed the district court's decision in Franklin's case, as the lower court's reasoning in the former case had merely been extended without comment to Barbara's case. *See id.* at 343.

After *Propst I* issued, the district court gave Franklin an opportunity to produce new evidence of the type that we had identified as dispositive in that opinion– " 'specific, nonconclusory factual allegations' that the administrative defendants sought to punish [him] on account of speech and disregarded other considerations." (*id.* at 346 (citation omitted).) In response, Franklin submitted only the deposition of Dillon Mapother, a professor of physics who had acted as a liaison between the Vice-Chancellor of Research and CERL. Mapother testified that in February or March of 1987, he gradually came to believe that Janes Loeb's investigation into the Propsts' allegations had turned into an investigation of the Propsts themselves and was aimed at developing a record that would allow the administration to take action against them. (Mapother Dep. at 53-56.) Mapother did not, however, point to any specific facts or conversations that supported

this theory, and he conceded that he could only speculate as to who might have given Loeb this directive. (*Id.* at 55-56.) In addition, as already noted, Loeb's informal probe was soon discontinued in favor of a formal investigatory audit by the University's auditing department, and Franklin was not transferred from his post until after that audit was concluded.

This testimony was clearly insufficient to save Franklin from the mandate of *Propst I*. The uncontroverted evidence established that Franklin was transferred only after the defendants had received numerous complaints from CERL employees concerning the destruction of working relationships in the Laboratory, and after the completion of the independent audit that absolved Bitzer of wrongdoing. Franklin has pointed to no evidence suggesting that Loeb's investigation, suspended in early 1987, played any role in the administrators' ultimate decision to transfer Franklin some eight months later. Mapother's opinion does no more than Franklin's or Barbara's to call the administrators' motives into question. It does not undercut the administrators' evidence that they had conferred with CERL employees, other university administrators, and the auditors before acting and that the information thereby gathered provided a legitimate bases for their decision. Like Barbara, then, Franklin has failed to produce " 'specific, nonconclusory factual allegations' " that Weir, Liebman and Berdahl transferred him in retaliation for his speech, rather than in an effort to promote the effective operation of CERL. The administrators are therefore entitled to qualified immunity from his suit, just as they were from Barbara's.

B. *Bitzer*

After resolving the qualified immunity issue, the district court granted summary judgment to Bitzer, finding that even with all inferences in their favor, the Propsts had failed to establish that the transfers violated the First Amendment.[3] We review the district court's grant of summary judgment de novo, drawing all reasonable inferences in favor of the Propsts. *Robinson v. PPG Indus., Inc.*, 23 F.3d 1159, 1162 (7th Cir. 1994). If our examination of the record reveals that the Propsts have raised a genuine issue as to any fact that could determine the outcome of a trial, summary judgment will have been inappropriate. *Betaco, Inc. v. Cessna Aircraft Co.*, 32 F.3d 1126, 1132 (7th Cir. 1994).

In *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), the Supreme Court established that the First Amendment protects public employees from retribution for speech that touches on a matter of public concern, provided that the employee's interest in expressing herself is not "outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Pickering*, 391 U.S. at 568; *see also Waters v. Churchill*, 114 S. Ct. 1878, 1884 (1994); *Connick v. Myers*,

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[3] The issue raised before the district court was actually twofold: (1) whether the transfers violated the First Amendment, and (2) whether Bitzer played a role in bringing about the transfers. Because we find no First Amendment violation, we need not reach the issue of Bitzer's role. Although Bitzer is the sole remaining defendant, our discussion will therefore refer to all defendants, as individual responsibility is not relevant.

461 U.S. 138, 142 (1983). The proper balance of these competing interests is a question of law. *See Connick*, 461 U.S. at 150 & n.10; *Breuer v. Hart*, 909 F.2d 1035, 1037 (7th Cir. 1990).

Bitzer has conceded that the Propsts' speech – alleging misuse of a state university's funds – involved a matter of public concern. Along with other courts, we have recognized the importance of an employee's interest in pointing out a misuse of public funds or other breach of public trust. *See Connor v. Reinhard*, 847 F.2d 384, 390-91 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988); *Knapp v. Whitaker*, 757 F.2d 827, 841-42 (7th Cir.), *cert. denied*, 474 U.S. 803 (1985); *see also O'Connor v. Steeves*, 994 F.2d 905, 915-16 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993); *O'Donnell v. Yanchulis*, 875 F.2d 1059, 1061-62 (3d Cir. 1989); *Conaway v. Smith*, 853 F.2d 789, 797-98 (10th Cir. 1988). As the Tenth Circuit observed in *Conaway*, "[s]peech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests." 853 F.2d at 797.

The Propsts interest in speaking out on these issues, however, must be balanced against the State's interest in the efficient operation of CERL. The State's interest can be assessed in terms of a variety of factors, including whether the speech impeded the employee's ability to perform his or her job and whether the speech undermined close working relationships that were essential to the fulfillment of public responsibilities. *See Glass v. Dachel*, 2 F.3d 733, 742 (7th Cir. 1993) (collecting cases); *see also Connick*, 461 U.S. at 150-53. As the Supreme Court explained in *Connick*, "[w]hen close working relationships are essential to fulfilling public responsibilities, a

wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-52; *cf. Pickering*, 391 U.S. at 569-73 (teacher's letter to local newspaper critical of school board members with whom teacher had no close working relationship "would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board").

Here, the defendants' position that the Propsts' were transferred because their speech was highly disruptive to close working relationships in a workplace that required loyalty and confidence is amply corroborated and is not undermined by any of the Propsts' evidence. Indeed, Franklin's own deposition testimony reveals that the Propsts' relationship with Bitzer deteriorated to the point of affecting their ability to work with him. Franklin acknowledged that the nature of his responsibilities required loyalty, mutual regard and trust between himself and Bitzer, and that by July 1987, their relationship had lost all of those qualities. (Franklin Dep. at 517, 521.) He also testified that as the summer wore on, he found it increasingly difficult to perform his function as Associate Director of CERL. (*Id.* at 516-18.) In fact, Franklin explained that Bitzer and the Propsts eventually stopped speaking to one another directly and managed to communicate only by way of a "go-between." (*Id.* at 521.)

The evidence also revealed that the disruption extended beyond Barbara and Franklin, affecting other CERL employees as well. During the six-month audit, two groups of CERL business office employees met with Berdahl to complain that the audit was undermining their work and that the business office was no longer functioning efficiently. Several employees also told Berdahl that

they perceived Franklin and Barbara Propst to be intentionally impeding the work of the Laboratory. At the second meeting, the employees threatened to resign if the disruption persisted. By early fall of 1987, Weir and Liebman also had received numerous reports that morale at CERL was low and that the research work of the Laboratory was behind schedule. Barbara testified that she and her husband felt increasingly isolated from the other CERL employees, who were at times reluctant to work with them. (Barbara Dep. at 235-36.)

The Propsts have attempted to counter this evidence with the depositions of several CERL employees who testified that their work was not affected by the Propsts' allegations concerning Bitzer or that the allegations did not interfere with the day-to-day operations of the business office. (*See, e.g.*, Stifle Dep. at 8-10; Barry Dep. at 12; Rypski Dep. at 5-7.) But this testimony does not suffice to raise a question of material fact. The fact that some CERL employees did not feel affected does not negate the fact that others did. The Propsts offered no evidence contradicting the fact that several CERL employees met with Berdahl and threatened to resign. That fact therefore remains uncontested. Nor is there any evidence suggesting that the Propsts' relationship with Bitzer was not significantly affected. Indeed, that fact is supported by Franklin's own testimony. There is therefore no factual dispute that the Propsts' relationship with Bitzer was seriously undermined and that at least some other CERL employees found the tension in the laboratory to be intolerable.

There is thus no question of fact that CERL's operations were significantly disrupted. Because the evidence

unequivocally establishes that, as a result of the Propsts' accusations, CERL could no longer accomplish its mission unless either Bitzer or the Propsts were removed from the Laboratory, the Propsts' First Amendment rights were not violated by their transfer. This holding is consistent with that of cases such as *Marquez v. Turnock*, 967 F.2d 1175, 1176-77, 1179 (7th Cir. 1992), and *Breuer*, 909 F.2d at 1039-42.

C. *State law claims*

The Propsts also challenge the district court's dismissal of their state law retaliatory discharge claims against all of the defendants under Fed. R. Civ. P. 12(b)(6).[4] We review de novo the district court's dismissal of claims under Rule 12(b)(6), accepting as true all well-pleaded factual allegations and drawing all reasonable inferences in the Propsts' favor. *Edward E. Gillen Co. v. City of Lake Forest*, 3 F.3d 192, 197 (7th Cir. 1993).

To state a claim for retaliatory discharge under Illinois law, plaintiffs must allege (1) that they were discharged, (2) that their discharge was in retaliation for their activities, and (3) that their discharge violated a clearly mandated public policy of the State of Illinois. *Ludwig v. C & A Wallcoverings, Inc.*, 960 F.2d 40, 42 (7th Cir. 1992) (citing *Hinthorn v. Roland's of Bloomington, Inc.*,

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[4] Although the complaints are somewhat unclear as to the precise basis of the Propsts' state law claims, the parties as well as the district court have treated them as retaliatory discharge claims.

519 N.E.2d 909, 911 (Ill. 1988); *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1358 (Ill. 1985)).

The Propsts have sought to circumvent the obvious problems posed by the first requirement through a theory of constructive discharge, but their attempt fails because it is contrary to Illinois law. As we have previously observed, "Ilinois courts have repeatedly expressed their reluctance to expand the tort [of retaliatory discharge] beyond its original confines, particularly with respect to the first element of discharge." *Ludwig*, 960 F.2d at 42-43 (collecting cases). Illinois courts have therefore consistently refused to recognize constructive discharge as the basis for retaliatory discharge claims. *Id.* (citing *Grey v. First Nat'l Bank*, 523 N.E.2d 1138, 1143 n.2 (Ill. App. Ct. 1988), and *Scheller v. Health Care Service Corp.*, 485 N.E.2d 26, 35 (Ill. App. Ct. 1985)).[5]

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[5] In addition, in Illinois, a plaintiff seeking to establish a constructive discharge must show that "the employer deliberately or intentionally made the employee's working conditions so intolerable that a reasonable person would have felt compelled to resign to escape the intolerable conditions." *Dudycz v. City of Chicago*, 563 N.E.2d 1122, 1126 (Ill. App. Ct. 1990) (citations omitted), *appeal denied*, 567 N.E.2d 330 (Ill. 1991); *see also Motley v. Illinois Human Rights Comm'n*, 636 N.E.2d 100, 104 (Ill. App. Ct. 1994) (focus in constructive discharge case is on whether reasonable employee in plaintiff's position would have felt compelled to resign). *Steele v. Illinois Human Rights Comm'n*, 513 N.E.2d 1177, 1179-80 (Ill. App. Ct. 1987); *Brewington v. Illinois Department of Corrections*, 513 N.E.2d 1056, 1060 (Ill. App. Ct. 1987). Thus, even if a constructive discharge theory were legally cognizable, the Propsts have failed to allege constructive discharge under Illinois law. They have not shown that they faced intolerable working conditions in their new positions or that they felt compelled to resign.

The Propsts point out that since we decided *Ludwig*, the Illinois Supreme Court has agreed to consider the issue of whether a "retaliatory demotion" may be actionable. *See Zimmerman v. Buchheit of Sparta, Inc.*, 615 N.E.2d 791 (Ill. App. Ct.), *appeal granted*, 622 N.E.2d 1230 (Ill. 1993). In *Zimmerman*, the Illinois Appellate Court reversed the dismissal of a retaliatory discharge claim where the plaintiff alleged that she had been demoted and that her hours had been reduced in retaliation for seeking workers' compensation benefits. *Id.* at 792. Zimmerman sought damages for lost income and benefits that had resulted from her demotion. *Id.* Should the Illinois Supreme Court affirm the Appellate Court's decision in *Zimmerman* and recognize a retaliation claim in the context of a demotion that entails tangible economic loss, however, the Propsts' claim still would not be saved. The Propsts have not offered any evidence suggesting that their transfers amounted to a demotion or resulted in decreased salaries, benefits or rank. Indeed, the evidence revealed that they experienced no loss of either compensation or rank and that they received their scheduled salary increases. The district court's dismissal of their retaliatory discharge claim was therefore proper.

III.

We AFFIRM the district court's grant of summary judgment in favor of Bitzer, Weir, Liebman and Berdahl as well as its dismissal of the Propsts' state law claims.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS –
SPRINGFIELD DIVISION

FRANKLIN M. PROPST, Plaintiff,	)	
v.	)	No. 88-3005
DONALD L. BITZER, et al., Defendants.	)	(Filed Nov. 10, 1992)

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Defendants' renewed joint motion for summary judgment. The motion is made only on behalf of Defendants Weir, Liebman, and Berdahl.

Franklin M. Propst and his wife, Barbara Propst, each brought suit separately under 42 U.S.C. §1983, alleging a violation of their First Amendment rights by University of Illinois officials. While Plaintiff was employed by the university, he filed complaints with the university that Donald L. Bitzer, the head of the Plaintiff's department, had misused and converted university funds for personal use. Mr. Propst's wife, also employed by the university, made similar allegations. The complaints of the Propsts eventually led to an audit of Mr. Bitzer's department. Following their complaints, both Franklin and Barbara Propst were transferred to other departments within the university. They alleged that their transfers were in retaliation for the complaints they brought against Mr. Bitzer.

Defendants Weir, Liebman, and Berdahl in both cases moved for summary judgment on the affirmative defense of qualified immunity, and these motions were denied by this Court. However, Barbara Propst immediately appealed this Court's ruling in her case via certification to the United States Court of Appeals for the Seventh Circuit, pursuant to 28 U.S.C. §1291.

The Seventh Circuit reversed this Court's denial of the Defendants' motion for summary judgment on the issue of qualified immunity in Mrs. Propst's case, and the same three Defendants have consequently renewed their joint motion for summary judgment in this case based on the outcome of Barbara Propst's appeal. Because both cases present the same legal issue of qualified immunity in identical procedural and factual contexts, summary judgment for the three defendants on the issue of qualified immunity is appropriate at this time. *Propst v. Weir,* 937 F.2d 338 (7th Cir. 1991).

Ergo, the Defendants Weir, Liebman, and Berdahl's renewed joint motion for summary judgment (d/e 99) is ALLOWED.

ENTER: 10 Nov., 1992
FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

United States District Court

CENTRAL DISTRICT OF ILLINOIS

FRANKLIN M. & BARBARA J. PROPST	JUDGMENT IN A CIVIL CASE
V.	(Filed Oct. 27, 1993)
DONALD L. BITZER	CASE NUMBER: 88-3005 89-3254 ✓

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED. Pursuant to an order entered by the Honorable Richard Mills: Defendant's motion for summary judgment is allowed. The parties are to bear their own costs.

October 27, 1993
Date

/s/ John M. Waters
Clerk

/s/ Christy Taylor
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS –
SPRINGFIELD DIVISION

FRANKLIN M. & BARBARA J. PROPST, Plaintiffs,	)	No. 88-3005 89-3254 ✓
v.	)	(Filed Oct. 27, 1993)
DONALD L. BITZER, Defendant.	)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Defendants' motion for summary judgment.

I. Background

The Defendant is the director of the Computer Education Research Laboratory at the University of Illinois. The Plaintiffs were employed for several years as associate director and assistant director, respectively, of the laboratory. Prior to January of 1987, the Plaintiffs reported to the senior administrators of the university that the Defendant was engaging in misconduct as the result of a conflict of interest. The Plaintiffs claims that the Defendant was improperly arranging purchases for the laboratory through a company in which the Defendant held a controlling ownership interests.

Based on these complaints, the university ordered an audit of the defendant's department. The audit report

was submitted to the university administrators in the fall of 1987, and it revealed that the Defendant was not responsible for any material conflict of interest. The administrators determined that the reported malfeasance was the result of a deterioration in the working conditions within the laboratory, and in order to alleviate any further disruption in the functioning of the laboratory, the administrators transferred the Plaintiffs, at no reduction in pay or rank, to other positions in the university.

Following their transfers, the Plaintiffs filed suit against the Defendant and the university administrators who authorized the transfers, claiming that the Plaintiffs had suffered an adverse employment action for exercise of their First Amendment right to free speech. The Court previously entered summary judgment in favor of the university administrators on the basis of qualified immunity, and the only remaining claim is that against the Defendant in his individual capacity.

II. Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment shall be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Black v. Henry Pratt Co.*, 778 F.2d 1278, 1281 (7th Cir. 1985). The moving party has the burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In

determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir. 1983).

III. Analysis

The Plaintiffs claim that the defendant caused their transfer to other departments in the university in retaliation for their exercise of free speech in reporting alleged misconduct of the Defendant. It is well established that a public employee may not be subjected to "an adverse employment decision" for making statements pertaining to a matter of public concern, i.e., "actual or potential wrongdoings or breach of public trust." *Marquez v. Turnock*, 967 F.2d 1175, 1177-78 (7th Cir. 1992). However, the Seventh Circuit has held that in order for an individual to be held liable for a constitutional violation, that person must have "caused or participated in" the alleged deprivation. *Papapetrpoulous v. Milwaukee Transport Services, Inc.*, 797 F.2d 591, 595 (7th Cir. 1986). Such causation results where a person "set[s] in motion a series of events that [that person] . . . should reasonably have known would cause *others* to deprive the plaintiff of [his] constitutional rights." *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988) (emphasis added). The Defendant claims that he bears no responsibility for the decision of the university administrators to transfer the Plaintiffs elsewhere in

the university, and that therefore, he cannot be held liable for depriving the Plaintiffs of their rights to free speech.

First, the Plaintiffs have failed to establish that they suffered from an adverse employment decision. It is true that the Plaintiffs were transferred to other departments in the university; however, they suffered no reduction in either pay or rank as a result of the transfers. Plaintiff Franklin Propst became a tenured professor in the physics department, and Plaintiff Barbara Propst assumed an administrative position in the college of life sciences. While those positions may not have been as desirable to the Plaintiffs, they did not result in any diminution of seniority or pay within the university system and cannot thus be characterized as "adverse."

Second, the audit report established that the Defendant had engaged in no material wrongdoing. Consequently, the Plaintiffs were not speaking on a matter of public concern, as there was no serious misconduct to report. It appears from a review of the record that a high degree of hostility had developed between the Plaintiffs and the Defendant in the operation of the computer laboratory and that it was this state of affairs that prompted the Plaintiffs' conduct and the ultimate decision of the university administrators to transfer the Plaintiffs out of the laboratory.

Nonetheless, even assuming that the Plaintiffs somehow suffered adversely as a direct result of speaking out on what they believed to be issues of public concern, the Plaintiffs have failed to offer sufficient proof showing that the Defendant caused them to be transferred for exercising their right of free speech. The Plaintiffs argue

that the Defendant persistently wrote letters to the university administrators complaining of his work relationship with the Plaintiffs and threatening to resign if the administrators did not do something about the Plaintiffs. The Plaintiffs assert that this conduct on the part of the Defendant proximately caused the administrators to make their transfer decision.

However, under the causation test enunciated by the Seventh Circuit, a plaintiff must show that a defendant caused *others* to deprive the plaintiff of a constitutional right. *Conner,* 847 F.2d at 397. This the Plaintiffs have failed to do. They have offered no proof that the university administrators transferred the Plaintiffs for exercise of their right of free speech. The audit of the computer laboratory produced no evidence of any material conflict of interest on the part of the Defendant, and the administrators have testified that their decision to order the transfer of the Plaintiffs was based on the discord and disruption in the operation of the computer laboratory that had developed as a result of the animosity that existed between the Plaintiffs and the Defendant. Because the Plaintiffs have not established that the administrators deprived them of a constitutional right, then, by definition, the Defendant could not have caused the administrators to interfere with the Plaintiffs' right of free speech.

In essence, this cause of action is the result of an employment dispute arising out of a breakdown in the working relationships within the computer laboratory. When the administrators were informed of possible misconduct in the laboratory, they acted to determine whether there was any basis to the allegations. Once they

determined that the allegations were substantially without merit, the administrators acted to end the perceived turmoil that existed in the computer laboratory. The administrators believed that the best way to end the personnel disruption was to transfer the Plaintiffs to another department within the university.

Such conduct was an exercise of business judgment on the part of the administrators and is beyond questioning by this Court. The administrators were entitled to manage the departments of the university however they pleased, as long as they did not violate any of the protections afforded the Plaintiffs by the U.S. Constitution. The Plaintiffs having failed to establish that a genuine issue of material fact exists as to whether the Defendant caused the university administrators to adversely transfer the Plaintiffs for exercise of their First Amendment right of free speech, the Defendant is entitled to judgment as a matter of law.

Ergo, the Defendant's motion for summary judgment (d/e 139) is ALLOWED. The parties are to bear their own costs.

SO ORDERED.

CASE CLOSED.

ENTER: 26, October, 1993
FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

United States District Court

CENTRAL DISTRICT OF ILLINOIS

FRANKLIN M. & BARBARA J. PROPST	JUDGMENT IN A CIVIL CASE
V.	(Filed Oct. 27, 1993)
DONALD L. BITZER	CASE NUMBER: 88-3005 89-3254

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED. Pursuant to an order entered by the Honorable Richard Mills: Defendant's motion for summary judgment is allowed. The parties are to bear their own costs.

October 27, 1993
Date

/s/ John M. Waters
Clerk

/s/ Christy Taylor
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS –
SPRINGFIELD DIVISION

FRANKLIN M. & BARBARA J. PROPST, Plaintiffs,	)	No. 88-3005✓ 89-3254
v.	)	(Filed Oct. 27, 1993)
DONALD L. BITZER, Defendant.	)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Defendants' motion for summary judgment.

I. Background

The Defendant is the director of the Computer Education Research Laboratory at the University of Illinois. The Plaintiffs were employed for several years as associate director and assistant director, respectively, of the laboratory. Prior to January of 1987, the Plaintiffs reported to the senior administrators of the university that the Defendant was engaging in misconduct as the result of a conflict of interest. The Plaintiffs claimed that the Defendant was improperly arranging purchases for the laboratory through a company in which the Defendant held a controlling ownership interest.

Based on these complaints, the university ordered an audit of the defendant's department. The audit report

was submitted to the university administrators in the fall of 1987, and it revealed that the Defendant was not responsible for any material conflict of interest. The administrators determined that the reported malfeasance was the result of a deterioration in the working conditions within the laboratory, and in order to alleviate any further disruption in the functioning of the laboratory, the administrators transferred the Plaintiffs, at no reduction in pay or rank, to other positions in the university.

Following their transfers, the Plaintiffs filed suit against the Defendant and the university administrators who authorized the transfers, claiming that the Plaintiffs had suffered an adverse employment action for exercise of their First Amendment right to free speech. The Court previously entered summary judgment in favor of the university administrators on the basis of qualified immunity, and the only remaining claim is that against the Defendant in his individual capacity.

II. Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment shall be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Black v. Henry Pratt Co.*, 778 F.2d 1278, 1281 (7th Cir. 1985). The moving party has the burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In

determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir. 1983).

III. Analysis

The Plaintiffs claim that the defendant caused their transfer to other departments in the university in retaliation for their exercise of free speech in reporting alleged misconduct of the Defendant. It is well established that a public employee may not be subjected to "an adverse employment decision" for making statements pertaining to a matter of public concern, i.e., "actual or potential wrongdoings or breach of public trust." *Marquez v. Turnock*, 967 F.2d 1175, 1177-78 (7th Cir. 1992). However, the Seventh Circuit has held that in order for an individual to be held liable for a constitutional violation, that person must have "caused or participated in" the alleged deprivation. *Papapetropoulous v. Milwaukee Transport Services, Inc.*, 797 F.2d 591, 595 (7th Cir. 1986). Such causation results where a person "set[s] in motion a series of events that [that person] . . . should reasonably have known would cause *others* to deprive the plaintiff of [his] constitutional rights." *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988) (emphasis added). The Defendant claims that he bears no responsibility for the decision of the university administrators to transfer the Plaintiffs elsewhere in

the university, and that therefore, he cannot be held liable for depriving the Plaintiffs of their right to free speech.

First, the Plaintiffs have failed to establish that they suffered from an adverse employment decision. It is true that the Plaintiffs were transferred to other departments in the university; however, they suffered no reduction in either pay or rank as a result of the transfers. Plaintiff Franklin Propst became a tenured professor in the physics department, and Plaintiff Barbara Propst assumed an administrative position in the college of life sciences. While those positions may not have been as desirable to the Plaintiffs, they did not result in any diminution of seniority or pay within the university system and cannot thus be characterized as "adverse."

Second, the audit report established that the Defendant had engaged in no material wrongdoing. Consequently, the Plaintiffs were not speaking on a matter of public concern, as there was no serious misconduct to report. It appears from a review of the record that a high degree of hostility had developed between the Plaintiffs and the Defendant in the operation of the computer laboratory and that it was this state of affairs that prompted the Plaintiffs' conduct and the ultimate decision of the university administrators to transfer the Plaintiffs out of the laboratory.

Nonetheless, even assuming that the Plaintiffs somehow suffered adversely as a direct result of speaking out on what they believed to be issues of public concern, the Plaintiffs have failed to offer sufficient proof showing that the Defendant caused them to be transferred for exercising their right of free speech. The Plaintiffs argue

that the Defendant persistently wrote letters to the university administrators complaining of his work relationship with the Plaintiffs and threatening to resign if the administrators did not do something about the Plaintiffs. The Plaintiffs assert that this conduct on the part of the Defendant proximately caused the administrators to make their transfer decision.

However, under the causation test enunciated by the Seventh Circuit, a plaintiff must show that a defendant caused *others* to deprive the plaintiff of a constitutional right. *Conner,* 847 F.2d at 397. This the Plaintiffs have failed to do. They have offered no proof that the university administrators transferred the Plaintiffs for exercise of their right of free speech. The audit of the computer laboratory produced no evidence of any material conflict of interest on the part of the Defendant, and the administrators have testified that their decision to order the transfer of the Plaintiffs was based on the discord and disruption in the operation of the computer laboratory that had developed as a result of the animosity that existed between the Plaintiffs and the Defendant. Because the Plaintiffs have not established that the administrators deprived them of a constitutional right, then, by definition, the Defendant could not have caused the administrators to interfere with the Plaintiffs' right of free speech.

In essence, this cause of action is the result of an employment dispute arising out of a breakdown in the working relationships within the computer laboratory. When the administrators were informed of possible misconduct in the laboratory, they acted to determine whether there was any basis to the allegations. Once they

determined that the allegations were substantially without merit, the administrators acted to end the perceived turmoil that existed in the computer laboratory. The administrators believed that the best way to end the personnel disruption was to transfer the Plaintiffs to another department within the university.

Such conduct was an exercise of business judgment on the part of the administrators and is beyond questioning by this Court. The administrators were entitled to manage the departments of the university however they pleased, as long as they did not violate any of the protections afforded the Plaintiffs by the U.S. Constitution. The Plaintiffs having failed to establish that a genuine issue of material fact exists as to whether the Defendant caused the university administrators to adversely transfer the Plaintiffs for exercise of their First Amendment right of free speech, the Defendant is entitled to judgment as a matter of law.

Ergo, the Defendant's motion for summary judgment (d/e 139) is ALLOWED. The parties are to bear their own costs.

SO ORDERED.

CASE CLOSED.

ENTER: 26, October, 1993
FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-1168
WILLIAM J. ELLIOTT,

Plaintiff-Appellee,

v.

WILLIAM THOMAS, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 8187 – Brian Barnett Duff, *Judge.*

Nos. 90-2098 and 90-2146
BARBARA PROPST,

Plaintiff-Appellee,

v.

MORTON W. WEIR, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 89-8254 – Richard Mills, *Judge.*

ARGUED APRIL 4, 1991 – DECIDED JULY 15, 1991

Before EASTERBROOK and MANION, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*.

EASTERBROOK, *Circuit Judge*. These cases present a common question of appellate jurisdiction: whether a court's refusal to grant summary judgment to a defendant who denies committing any wrong may be appealed immediately as a "collateral order" on the authority of *Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985). To state this question is to answer it. A defense of no wrongdoing is not collateral to the merits; it is the nub of the case. Accordingly, we dismiss two of the appeals. A third is within our jurisdiction, and we conclude that the defendants are entitled to qualified immunity as a matter of law.

William Elliott filed suit under 42 U.S.C. § 1983 contending that the police beat him when they took him into custody. Elliott contends that the beating perforated his eardrum (leaving him with a partial loss of hearing) and broke several teeth. The defendants moved for summary judgment, submitting affidavits and medical records that, they contend, show that Elliott's injuries (if any) predated the arrest, and that he suffered no new hurt at their hands. The district court concluded that there is a genuine dispute about what happened to Elliott when he was arrested, and it set the case for trial. 1990 U.S. Dist. LEXIS 711 (N.D. Ill.). The defendants have appealed.

Barbara Propst, formerly the Assistant Director of the Computer-based Education and Research Laboratory at the University of Illinois, sued under § 1983 contending that her transfer to Assistant Dean in the College of Applied Life Sciences penalized her for speech that she believes protected by the first amendment. Propst

reported to administrators of the University that Donald L. Bitzer, then Director of the Laboratory, had a conflict of interest because he was acquiring goods and services for the Laboratory through corporations in which he had an ownership interest. The University commissioned an audit, which interfered with normal activities of the Lab. The three officials responsible for Propst's transfer – Chancellor Morton W. Weir and Vice-Chancellors Judith S. Liebman and Robert M. Berdahl – contend that they acted to promote efficient operation in the Lab, impossible with the Director and his two chief aides (Barbara Propst and her husband Franklin, then Associate Director of the Lab) at each other's throats. Bitzer contends that he had nothing to do with the transfer – that he did not know of the Propsts' complaints, did not know why the University was running a detailed audit, and never asked higher-ups to do anything about the Propsts. The district court denied the defendants' motions for summary judgment, and all four have appealed.

I

The defense of qualified immunity articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and amplified in *Anderson v. Creighton*, 483 U.S. 635 (1987), gives public officials the benefit of legal doubts. An official who does not violate law "clearly established" at the time, 457 U.S. at 818, is entitled not only to prevail, but to prevail before trial. Qualified immunity, we know from *Mitchell*, establishes a right not to be tried. When rules of law clearly establish public officials' duty, the immunity defense is unavailable. So, too, the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no

legal uncertainty; there is no separate "right not to be tried" on the question whether the defendants did the deeds alleged; that is *precisely* the question for trial.

By sleight of hand you can turn any defense on the merits into a defense of qualified immunity. Consider this possibility of the police officers Elliott has sued: It was not "clearly established" in May 1986, when we arrested Elliott, that police officers could be liable for taking peaceable custody of a suspect; the district court proposes to hold a trial at which the only outcome favorable to plaintiff (given the uncontroverted evidence that Elliott suffered no injury) would be a holding that police *are* liable for making arrests that cause no injury; that would be a change of law, which we cannot be expected to forecast; therefore we are entitled to qualified immunity. The parenthetical expression carries the entire weight of this "argument": if you allow the possibility that the suspect will show injury at trial, then the defendants may be held liable under the law as it existed in 1986. So the claim to immediate appellate review collapses to the argument that the "right not to be tried" can be vindicated only if the court of appeals combs through the factual record. Yet that is miles away from the position of *Harlow, Mitchell,* and *Anderson,* which describe qualified immunity as a defense contingent on the state of the law.

To say that the question on appeal under *Mitchell* is the state of the law when the defendants acted is not to say that current law is irrelevant. *Siegert v. Gilley,* 111 S. Ct. 1789 (1991), holds that a court of appeals may, sometimes must, answer the question whether it was clearly

established on a given date that particular conduct violates the Constitution by replying: "Why, that is not established even today; if defendants did everything the plaintiffs alleged, still they did not violate the Constitution." Deciding just *when* it became "clearly established" that public officials could not do something that the Constitution allows them to do is silly. Our defendants do not say, however, that the Constitution today allows police to beat suspects, or allows university administrators to discriminate against business officials on account of speech.

Facts too play a role in *Mitchell* appeals. It is impossible to know which "clearly established" rules of law to consult unless you know what is going on. *Auriemma v. Rice*, 910 F.2d 1449, 1455 (7th Cir. 1990) (in banc). *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986), went overboard in holding that the court of appeals must look exclusively to the allegations of the complaint, so that it will not be tainted by the facts in assessing "clearly established" law. *Unwin v. Campbell*, 863 F.2d 124, 130-33 (1st Cir. 1988), overrules *Bonitz* and holds that the court of appeals may consult the full record – viewed as Fed. R. Civ. P. 56 requires, in the light most favorable to the party opposing the motion for summary judgment. *Green v. Carlson*, 826 F.2d 647 (7th Cir. 1987), puts us on the side of Unwin, as is every other court of appeals. The fifth circuit flirted with *Bonitz* in *Jefferson v. Ysleta Independent School District*, 817 F.2d 303, 305 (5th Cir. 1987), but retreated in *Geter v. Fortenberry*, 849 F.2d 1550, 1559-60 (5th Cir. 1988). For a smattering of other cases see *Brown v. Grabowski*, 922 F.2d 1097, 1110-11 (3d Cir. 1990); *Turner v. Dammon*, 848 F.2d 440, 444 (4th Cir. 1988); *Poe v. Haydon*, 853 F.2d 418, 425 (6th Cir. 1988);

DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 719 (10th Cir. 1988).

Yet the *reason* a court of appeals examines the facts is to determine whether it was "clearly established" at the time that such deeds were forbidden. *Anderson*, 483 U.S. at 641. It would extend *Mitchell* well beyond its rationale to accept an appeal containing nothing but a factual issue. We have expressed concern that being too ready to entertain interlocutory appeals on immunity grounds would increase the expense plaintiffs must bear, and the delay they must endure, to vindicate their rights. *Abel v. Miller*, 904 F.2d 894, 396 (7th Cir. 1990); *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989). If a general defense on the merits supports interlocutory appeal, then every public defendant is entitled to pretrial appellate decision. *Mitchell* did not create a general exception to the finality doctrine for public employees. Every court that has addressed the question expressly has held that *Mitchell* does not authorize an appeal to argue "we didn't do it". *Kaminsky v. Rosenblum*, 929 F.2d 922 (2d Cir. 1991); *Ryan v. Burlington County*, 860 F.2d 1199, 1203 & n.8 (3d Cir. 1988); *Lion Boulos v. Wilson*, 834 F.2d 504, 509 (5th Cir. 1987); *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987). We join them.

Bitzer does not contend that he acted in the shadow of legal uncertainty. He submits, rather, that he did not know about and had nothing to do with the events of which Propst complains. His appeal, No. 90-2146, is unrelated to qualified immunity and is dismissed for want of jurisdiction.

The four defendants in Elliott's case make at least a stab at presenting a legal issue. *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985), says that excessive force during an arrest violates the due process clause only if acts that shock the conscience produce severe injury. We overruled the subjective approach in *Lester v. Chicago*, 830 F.2d 706 (7th Cir. 1987), in favor of the objective reasonableness standard of the fourth amendment. *Graham v. Connor*, 490 U.S. 386 (1989), holds that *Lester* got it right. *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), made it clear that *Graham* also abrogated the significant-injury component of *Gumz* – although not all courts agree with our conclusion. See *Hudson v. McMillian*, 111 S. Ct. 1579 (1991), granting certiorari to review the significant-injury rule still enforced in the fifth circuit. See *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (in banc). Defendants contend that they were entitled to the benefits of *Gumz* when they arrested Elliott in 1986. The difficulty is that this legal debate has nothing to do with their defense – that they did not injure Elliott at all. If they punctured Elliott's eardrum without provocation, as Elliott contends, then Elliott recovers under any standard; if the defendants did nothing, as they say, then they prevail under any standard. Legal uncertainty plays no role. Moreover, *Gumz* had limited the circumstances under which persons could recover damages, which is distinct from defining lawful conduct. See *Kurowski v. Krajewski*, 848 F.2d 767, 774-75 (7th Cir. 1988). No reasonable police officer would have thought that *Gumz* condoned cuffing a suspect in the ear (the act Elliott says punctured his eardrum). The only substantial questions are whether the officers did what they are accused of and, if they did, whether these acts

injured Elliott. As such questions are outside our jurisdiction, we dismiss appeal No. 90-1168.

II

The Chancellor and Vice-Chancellors of the University of Illinois knew about the Propsts' complaints. Unlike Bitzer, these three officials present a genuine immunity defense: that the law had not clearly established the impropriety of transferring a public employee whose speech created a disturbance undermining the productivity of other workers. Propst's constitutional claim depends on *Pickering v. Board of Education*, 391 U.S. 563 (1968), which establishes a balancing approach. Public employers may consider disruptive speech under some circumstances, but not all. Legal ambiguity in the wake of *Pickering* sets the stage for immunity. See *Greenberg v. Kmetko*, 922 F.2d 382 (7th Cir. 1991); cf. *Thulen v. Bausman*, 930 F.2d 1209 (7th Cir. 1991).

Berdahl contends that he began receiving reports that important members of the staff thought that the work of the Laboratory was in jeopardy and were looking for other employment. Two groups of employees visited Berdahl to voice their concerns about deteriorating relations between Bitzer and the Propsts. Weir received letters reporting that the Lab was in "bad shape". Weir, Berdahl, and Liebman submit that they decided that either Bitzer or the Propsts had to go if the Laboratory was to return to normal. When in the fall of 1987 the auditors submitted a report that the administrators interpreted as absolving Bitzer of any material conflicts, the administrators decided to move the Propsts. They transferred Barbara to

an administrative position in the College of Life Sciences, and Franklin returned to the Physics Department, where he was a tenured professor. Neither transfer involved loss of pay or rank within the University. Such transfers, the administrators submit, are justified to deal with a demonstrated disruption in working conditions. E.g., *Breuer v. Hart*, 909 F.2d 1035, 1039-40 (7th Cir. 1990); *Knapp v. Whitaker*, 757 F.2d 827, 842-43 (7th Cir. 1985). At all events, they submit that this case is sufficiently close to the line that they are entitled to immunity – which "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Barbara Propst does not deny that the three administrators received reports of growing dissention, of diversion of time from the Lab's work, and of plans to leave unless something were done. She maintains, however, that conditions in the Lab were not nearly as bad as the administrators were led to believe (she submits that things were hunky-dory), that any disruption was caused by the audit rather than by conflict among the managers, and that the administrators' true intent was to retaliate on account of her speech rather than to facilitate the educational mission of the Laboratory. She demands additional discovery to pursue these avenues.

When denying the administrators' motion for summary judgment against Franklin Propst, the district court concluded that the cause and extent of breakdown in the Lab's functioning are genuine issues of material fact. The court adopted that reasoning without further elaboration in Barbara Propst's case. Yet the question is not what the

conditions in the Laboratory *were;* it is what the administrators reasonably believed them to have been. *Anderson,* 483 U.S. at 641; *Davis v. Jones,* No. 90-2336 (7th Cir. July 11, 1991). Objectively reasonable but mistaken conclusions do not violate the Constitution. If we assume that the staffers who visited and wrote to the administrators were lying, this does not establish that the administrators' actions were unreasonable, given the information in their possession. Conditions in the Laboratory are not relevant; the inquiry must focus on what the defendants knew, and whether reasonable persons in their position would have believed their actions proper given the state of the law in 1987.

That conclusion takes us straight to Barbara Propst's second argument, and a conundrum. She wants discovery and a trial to probe the defendants' mental processes: did they really rely on the reports, as they say, or were they out to penalize her speech, as she suspects? Yet *Harlow* eliminated the subjective component from official immunity (formerly "good faith immunity", a telling phrase) because searching for intent and other components of knowledge blocks the use of immunity as a shortcut to decision. 457 U.S. at 814-19; *Cleavinger v. Saxner,* 474 U.S. 193, 208 (1985). Official immunity creates a "right not to be tried"; yet if by arguing that the defendants acted with forbidden intent the plaintiff may obtain exhausting discovery and trial, the promise of a "right not to be tried" is a hoax. Carrying out the program of *Harlow* seems to imply attributing to the defendants the best intent they (objectively) could have under the circumstances, and asking whether the law at the time clearly establishes that persons with such an intent violate the Constitution. Yet

that would be the functional equivalent of eliminating all recoveries when a mental state is part of the definition of the wrong – as it is in cases of racial discrimination, excessive punishment, and many other constitutional torts. *E.g. Wilson v. Seiter,* 59 U.S.L.W. 4671 (U.S. June 17, 1991) (cruel and unusual punishments clause); *Daniels v. Williams,* 474 U.S. 327 (1986) (due process clause); *Washington v. Davis,* 426 U.S. 229, 238-48 (1976) (equal protection clause). How is it possible simultaneously to preserve remedies for egregious wrongdoing and nip in the bud efforts to prolong the agony of defendants who are fated to win under *Harlow?*

Auriemma gives part of the answer. We rejected the invitation to impute to official actors the best motives they could have. *Auriemma* adopts the approach of *Wade v. Hegner,* 804 F.2d 67, 69-70 (7th Cir. 1986), which distinguishes the role of intent in defining the violation from the role of intent in ascertaining whether particular conduct was clearly unlawful at the time. 910 F.2d at 1452-53. When intent is one of the substantive elements of a constitutional wrong, the plaintiff is entitled to an adequate opportunity to establish that the defendant acted with the proscribed intent. Whether the defendant knew of and defied the governing legal standards – that is, whether the defendant exhibited "good faith" – is irrelevant under *Harlow.* See also *Rakovich v. Wade,* 850 F.2d 1180, 1210 (7th Cir. 1987) (in banc). Other courts of appeals follow the same approach. E.G. *Hobson v. Wilson,* 737 F.2d 1, 29-30 (D.C. Cir. 1984).

What *Auriemma* and like cases leave unanswered is the question how it is then possible to comply with *Harlow's* directive that "[u]ntil this threshold immunity

question is resolved, discovery should not be allowed." 457 U.S. at 818. The Supreme Court granted certiorari in *Siegert v. Gilley* to address that question but ducked, concluding that the plaintiff had not stated a claim on which relief may be granted. Although the Court avoided decision for the moment, we can not. Like Justice Kennedy, see *Siegert*, 111 S. Ct. at 1795 (concurring opinion), we think that the best solution to the conundrum is to require the plaintiff to produce "specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal." Unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery. A series of cases adopt and elaborate on this approach. *Siegert v. Gilley*, 895 F.2d 797, 800-02 (D.C. Cir. 1990); *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1435-36 (D.C. Cir. 1987); *Halperin v. Kissinger*, 807 F.2d 180, 186-87 (D.C. Cir. 1986) (Scalia, J.); *Hobson*, 737 F.2d at 29-31; *Collinson v. Gott*, 895 F.2d 994, 1001-03 (4th Cir. 1990) (Phillips, J.), and 1011-12 (Butzner, J.); *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985); *Myers v. Morris*, 810 F.2d 1437, 1453-54 (8th Cir. 1987); *Sawyer v. County of Creek*, 908 F.2d 663, 665-68 (10th Cir. 1990); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 647-50 (10th Cir. 1988). We do not rehash the arguments, but two subjects call for brief discussion. One is straightforward. Although the court of appeals' opinion in *Siegert* insisted, 895 F.2d at 803-04, that the plaintiff produce "direct" evidence of the defendant's improper intent, we agree with Justice Kennedy that there is no principled difference between direct and circumstantial evidence. See *Holland v. United States*, 348 U.S. 121, 140 (1954). Requiring "direct" evidence of intent

would be fatal in all but the rare case in which the defendant confessed. The other subject is a bit more complex.

Judge Higginbotham, concurring in *Elliott*, 751 F.2d at 1482-83, expressed concern that what *Hobson* dubbed a "heightened pleading requirement" is inconsistent with the Rules of Civil Procedure. Rule 8 establishes a system of notice rather than fact pleading; Rule 9(b) says that motive and intent may be pleaded generally; Rule 56 requires a court acting on a motion for summary judgment to draw all reasonable inferences favorable to the party opposing the motion. A "heightened pleading requirement" in constitutional cases appears to conflict with all three rules. The Acting Solicitor General's brief in *Siegert* dealt with this by arguing that to the extent the rules hinder the immunity defense, they abridge a substantive right and so exceed the scope of the Rules Enabling Act, 28 U.S.C. § 2072(b). Brief for the Respondent at 25. Yet it is hard to depict a "right not to be tried" as substantive; it sounds distinctly procedural. The substantive right belongs to the plaintiff. It is better, we think, to recognize that official immunity is an affirmative defense, which need be asserted only after a plaintiff gets past the (slight) hurdles established by Rules 8 and 9(b). A possibility that the defendants will claim immunity does not require the plaintiff to anticipate and plead around that defense. *Gomez v. Toledo*, 446 U.S. 635 (1980). Defendants assert immunity by pleading it in the answer and moving for summary judgment.

Because *Gomez* holds that the complaint need not anticipate an immunity defense, it is misleading to speak of a "heightened *pleading* requirement". Nothing we say

here affects what the plaintiff must put in the complaint. Only Rule 56 remains for consideration. Rule 56 does not specify how much discovery should be allowed before the court acts; Rule 56(b) says that a defendant may move for summary judgment "at any time", authorizing motions in advance of discovery. Whether the district judge should allow discovery before acting on the motion depends on the governing law. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). If a rule of law crafted to carry out the promise of *Harlow* requires the plaintiff to produce some evidence, and the plaintiff fails to do so, then Rule 56(c) allows the court to grant the motion for summary judgment without ado. Cases such as *Hobson* therefore do not conflict with the rules – and to make this clear we deprecate the expression "heightened pleading requirement" and speak instead of the minimum quantum of proof required to defeat the initial motion for summary judgment.

In *Auriemma* the defendant gave plaintiff all the ammunition necessary to avoid summary judgment. After demoting many white police officers and promoting black officers over them, the chief of police denied having an affirmative action plan – which supported an inference that the chief had an improper intent and was not confused by the perplexing state of the law concerning affirmative action. The top administrators of the University of Illinois have not handed Propst her case on a platter. They contend that they acted solely to promote the efficient operation of an important part of their university.

Barbara Propst offers no reason other than her own suspicions to doubt the administrators' account of their reasons. Her husband's parallel case has produced substantial discovery; she does not argue that any of the discovery in that case undercuts the administrators' explanation. Barbara Propst has not produced "specific, nonconclusory factual allegations", *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring), that the administrative defendants sought to punish her on account of speech and disregarded other considerations. The state of the law on mixed-motive transfers was in 1987 – and remains – sufficiently ambiguous that the three administrators are entitled to immunity. See *Rakovich*, 850 F.2d at 1213.

Appeals No. 90-1168 and 90-2146 are dismissed for want of jurisdiction. On the administrators' appeal, No. 90-2093, the judgment is reversed.

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Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit